No. 18,705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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TABLE OF AUTHORITIES CITED

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To Circuit Judges Barnes, Merrill and Koelsch, as Constituting the Court on the Original Hearing:

Appellant in the above-entitled case respectfully prays the Court to grant a rehearing.

The principal question in the present posture of the case is whether the trial judge violated Rule 30 of the Federal Rules of Criminal Procedure in giving the jury an instruction on the law of conspiracy at the beginning of the trial and continuing to reinstruct the jury on conspiracy during the trial on nine different occasions, drumming this highly prejudicial procedure into the jury's mind while the government was presenting its evidence. It is the appellant's contention that this constituted a violation of fundamental rights guaranteed to him by the United States Constitution.

Rule 30 clearly states that "* * * the Court shall instruct the jury *after* the arguments are completed." (Emphasis added). This Court has stated in *Herzog v. United States* (1955), 226 F. 2d 561, at page 569:

> *"Rule 30 is clear and unambiguous and its application is not dependent upon the personal whims*

> *of the court. . . . This rule which has the force of law leaves no area in which it may be disregarded.*" (Emphasis added.)

On page 570 of the *Herzog* decision, this Court further added that under Rule 52 (F.R. Cr.P.):

> "This Court may notice plain or prejudicial error although not set forth as a specification of error relied upon as required by Rule 18 subd. 2 of the rules of this court."

There is no conflict between Rule 30 and Rule 52 and those rules do not nullify each other. Where plain errors or defects affect substantial rights they may be noticed on appeal even though they had not been brought to the attention of the trial court, under Rule 52. *Hawkins v. United States,* 358 U. S. 74.

If therefore it can be properly contended that Rule 30 has the force of law and cannot be disregarded, then it can be contended with equal force that the trial judge in this case committed reversible error in disregarding Rule 30 and instructing the jury on the law of conspiracy at the beginning of the trial and continuing his reference to this instruction throughout the trial.

In the second *Herzog* decision, *Herzog v. United States* (1956, 9th Cir.), 235 F. 2d 664 at 666, this Court having granted a rehearing, *en banc,* stated:

> "The Rule (52b) is in the nature of an anchor to the windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges."

What seems to us to be particularly disturbing about the affirmance in this case is that this Court did not apply Rule 30, or even discuss it, in the light of the issue which was raised in the defendant's opening brief (pp. 12-14) and discussed at length in the oral

argument. The Court completely disposed of this issue of first impression in its opinion by stating:

> "However, out of fairness to the defendants the jury could not be permitted to forget that they were concerned with an alleged conspiracy, and that the competence of certain evidence as to certain defendants depended upon a determination that a conspiracy existed. Not only was it entirely proper to instruct the jury periodically in this fashion, it might well have been prejudicial error not to do so."

Ordinarily we would agree with the Court that opinions which do not serve a public purpose should not be published in the law reports, but this violation of Rule 30 by the trial judge is an issue of first impression in our courts. We are entitled to know whether under Rule 30 a trial judge has the right to instruct a jury in a criminal case and reiterate that instruction nine times during the trial of the case before all evidence has properly been presented to the jury. Surely a jury of fair intelligence is presumed to know the ordinary meaning of a criminal conspiracy. It is entitled first to receive the evidence on the alleged conspiracy and then to decide whether a conspiracy is proved after applying the instruction on conspiracy as given to them by the trial court judge at the end of the trial as is required by Rule 30.

In *United States v. Atkinson* (1936), 297 U. S. 157, at 160, the Supreme Court stated:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Cited also in *Lash v. United States* (1955, 1st Cir.), 221 F. 2d 237 at 240. *Screws v. United States* (1945), 325 U. S. 91 at 107; and *Terminiello v. Chicago* (1948), 337 U. S. 1.

The question of critical importance in this case is whether the instruction on conspiracy given by the trial judge at the beginning of the trial and prejudicially drummed into the jury's consciousness nine times during the trial seriously affected the fairness, integrity or public reputation of the judicial proceedings. We submit that the affirmance of the present judgment in these circumstances would amount to a discrimination so unjustifiable as to infringe the Due Process clauses of the Fifth and Fourteenth Amendments. The question here is whether, as an original proposition, the premature instruction on conspiracy by the trial judge and his subsequent reiteration in violation of Rule 30 is so glaringly wrong as to call for the exercise of this Court's power under Rule 52(b) to notice "plain error".

In *Forster v. United States* (1956, 9th Cir.), 237 F. 2d 617, at 621, in reversing a conviction, Chief Judge Chambers summed up this Court's position that "the law must govern", as follows:

> "The nature of our system is that the law must govern. In saturating the system with safeguards for the innocent the guilty will ofttimes profit in such a way as to exasperate some of the fairest judges, the best prosecutors and even the general public as it looks at specific cases."

In *United States v. Palermo* (1958, 3rd Cir.), 259 F. 2d 872 at 881, the Court stated:

> "It is well settled that '. . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for

criminal trials in the federal courts.' *Bollenbach v. U.S.* (1946), 326 U.S. 607, 614.

"The rule stated in *Bollenbach* was spelled out as follows in *Wilson v. U.S.* (1958, 9th Cir.), 250 F.2d 312, at pages 324, 325:

> " 'It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. . . .
>
> " 'The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. . . .
>
> " 'The accused is entitled in any case to be tried under proper legal criteria. . . .' "

We therefore respectfully suggest, pursuant to the fifth paragraph of Rule 23 of this Court, that it would be eminently appropriate for this case to be heard *en banc,* to the end that this important question of federal criminal law and the right of a trial judge to do what this trial judge did in contravention of Rule 30 may be authoritatively resolved.

Rehearing is not sought in respect of any other questions.

Dated at Burbank, California, April 8, 1964.

Respectfully submitted,

David M. Richman,
Rogan & Radding,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I, David M. Richman, one of the attorneys for the Appellant, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated at Burbank, California, April 8, 1964.

DAVID M. RICHMAN